NO. 48576-1

COURT OF APPEALS, DIVISION II
STATE OF WASHINGTON

STATE OF WASHINGTON, RESPONDENT

v.

GREGORY LAMONT HUGHES SIMMONS, JR., APPELLANT

Appeal from the Superior Court of Pierce County
The Honorable Kathryn J. Nelson

No. 15-1-03793-7

BRIEF OF RESPONDENT

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B. STATEMENT OF THE CASE.

1. Procedure

On September 22, 2015, Gregory Lamont Hughes Simmons, Jr., hereinafter "defendant" was charged with theft of a motor vehicle. CP 3-4. The information also alleged that the incident was domestic violence related. *Id.*

The case proceeded to trial. On the first day of trial, the court discussed with both parties how the charges would be announced to the jury. IRP 5. The court suggested informing the jury that the charge was a "domestic violence incident." IRP 5. Defense counsel agreed with the court's statement. *Id.* The court later instructed the jury as indicated. IIRP 23.

After the close of the State's case, defense counsel made several motions. IIIRP 195. The first motion was a motion to dismiss based, in part, on the charging document being insufficient regarding facts for the

domestic violence allegation. *Id.* The second motion was to dismiss the domestic violence allegation itself on the basis that it should not apply to a non-violent crime. IIIRP 195-202. The court denied both motions, finding that the charging document was constitutionally sufficient and finding that, under the facts of the case, there was sufficient evidence presented that the taking of the motor vehicle was a domestic violence incident under RCW 10.99.020. IIIRP 210.

The defendant was found guilty as charged. CP 33, 34. The defendant was sentenced to a term of 29 months of incarceration. CP 57-72. He filed a timely notice of appeal on February 5, 2016. CP 73.

2. Facts

Lauren Lozada had been in a relationship with the defendant. IIRP 44-45. She and the defendant dated for five to six months, beginning in 2014 and ending in February of 2015. IIRP 45. In 2015, Lozada owned a 1986 Chevrolet Caprice. IIRP 46. She was the registered owner of the Caprice. IIRP 47.

In July of 2015, Lozada observed the defendant sitting on the hood of her car. IIRP 52. She told the defendant that he needed to leave her car alone. IIRP 53. The defendant told her "that's not happening" and attempted to grab the keys from her. *Id.* The defendant ultimately took Lozada's keys. IIRP 54. The defendant was trying to talk to Lozada. *Id.*

She stated the only way she was able to get away from the defendant was to give him a ride to his father's residence. *Id.* Lozada drove the defendant to his father's residence, but then discovered that he had removed the car alarm remote from the key ring. IIRP 55.

On August 12, 2015, Lozada had her Caprice parked at her mother's home in Tacoma. IIRP 55. That day, she learned that her car was missing. IIRP 56. She reported it to the police. IIRP 57. Lozada discovered that her car and her items were being sold on OfferUp—an internet website. IIRP 58. Lozada believed that the OfferUp seller was the defendant because the profile for the seller contained his direct telephone number and the seller was using the name "Monty," which is a shortened version of the defendant's middle name of Lamont. IIRP 61, 66. Lozada's Caprice was recovered on September 21, 2015, but was totaled at that time. IIRP 75.

On cross-examination, defense counsel asked Lozada about another occasion in which the defendant had broken into her car, grabbed her and threw her into the car as well. IIRP 84-85. This incident occurred in April of 2015. IIRP 93. The defendant had been upset that Lozada was going to Las Vegas by herself. IIRP 85. Defense counsel asked Lozada if the defendant had invited himself to come on the trip to Las Vegas, and she stated that he had. *Id.* Defense counsel then asked Lozada if she had

allowed the defendant to invite himself, and she stated, "I didn't allow him because he had beaten me up when he seen me. He had thrown me in the car, held me against my will, and made it to where he was going with me and he was making me drive." IIRP 85-86.

Defense counsel repeatedly asked Lozada about her failure to call the police during the alleged kidnapping. IIRP 86, 93-98. Only then, on redirect examination, did the State inquire about whether the defendant had been violent with Lozada in the past. IIRP 112. The State indicated, "Mr. Jordan asked you a lot about things you didn't do. With regard to the defendant, has he ever been violent with you?" IIRP 112. Thereafter, the State argued that defense had opened the door due to the repeated inquiry into the relationship between Lozada and the defendant and why Lozada did not seek police intervention. IIRP 113. The court agreed. *Id.*

Renee Brooks, a neighbor of Lozada's mother, testified that on April 12, 2015, Lozada's car was parked in her mother's driveway. IIRP 117, 119. Brooks saw the defendant take the car. IIRP 119-120. Brooks also identified the defendant from a photo montage at the time of the incident. IIRP 125, 146.

C. ARGUMENT.

1. THE TRIAL COURT PROPERLY EXERCISED ITS DISCRETION WHEN IT ALLOWED THE VICTIM TO TESTIFY PRIOR ACTS OF DOMESTIC VIOLENCE BETWEEN HER AND THE DEFENDANT BECAUSE THE DEFENSE OPENED THE DOOR TO THIS INFORMATION.

The determination of whether a party has opened the door to inadmissible evidence is reviewed for an abuse of discretion. ***State v. Warren***, 134 Wn. App. 44, 65, 138 P.3d 1081 (2006) (*citing* ***State v. Bennett***, 42 Wn. App. 125, 127, 708 P.2d 1232 (1985)). The trial court has considerable discretion in administering the open door rule. ***Ang v. Martin***, 118 Wn. App. 553, 562, 76 P.3d 787 (2003). By voluntarily raising a subject, a party may be deemed to have waived any objection to examination on that subject by the opposing party, even though that examination would otherwise have been forbidden by the rules of evidence. *See* ***State v. O'Neal***, 126 Wn. App. 395, 109 P.3d 429 (2005). In ***State v. Gefeller***, 76 Wn.2d 449, 458 P.2d 17 (1969), the Supreme Court further explained the rationale for the open door rule, as follows:

> It would be a curious rule of evidence which allowed one party to bring up a subject, drop it at a point where it might appear advantageous to him, and then bar the other party from all further inquiries about it. Rules of evidence are designed to aid in establishing the truth. To close the door after receiving only a part of the evidence not only leaves the matter suspended in air at a point markedly advantageous to the party who opened the door, but might well limit the proof to half-truths. Thus, it is a sound general rule that, when a party opens up a subject of inquiry

> on direct or cross-examination, he contemplates that the rules will permit cross-examination, as the case may be, within the scope of the examination in which the subject matter was first introduced.

Id. at 455.

The trial court in the present case properly exercised its discretion in finding the defense had opened the door to prior domestic violence incidents between the victim and the defendant. *See* IIRP 113. In this case, the State did not question the victim about prior acts of domestic violence in its direct examination. It was only after extensive questioning by the defense on cross examination about a prior incident in which the victim stated she was kidnapped and assaulted by the defendant that the State made inquiries about prior domestic violence incidents. IIRP 85-86.

The defendant is not alleging that his trial counsel was ineffective for opening the door to prior incidences of domestic violence, nor could he support such a claim. Defense counsel had a good strategic reason for questioning the victim about the prior incidents—he established that the victim had repeated opportunities to contact the police during the alleged kidnapping and assault and failed to do so. The fact that the victim failed to get help during the alleged incident, arguably, would impact her credibility. This strategic choice by defense properly allowed the State to

introduce evidence of past acts of violence by the defendant. As the State indicated:

> The door was opened, Your Honor. He inquired into a lot of things that didn't happen on that date, asking her and challenging her as to why she didn't do certain things in the car, didn't take certain steps. And I feel, especially in a domestic violence relationship and it this sort of context, this is absolutely relevant to explain the door that Counsel opened.

IIRP 113.

It was only on redirect that the State elicited testimony from the victim that the defendant had broken her ribs. IIRP 113. Because evidence of prior abuse was properly admitted as evidence in the case, the State was then free to present argument regarding the prior abuse in closing argument, as argued below.

2. THE DEFENDANT HAS FAILED TO MEET HIS BURDEN OF SHOWING PROSECUTORIAL ERROR[1] OR THAT ANY UNCHALLENGED ARGUMENT WAS FLAGRANT AND ILL-INTENTIONED WHEN NO ACTUAL ERROR OCCURRED.

"Trial court rulings based on allegations of prosecutorial misconduct are reviewed under an abuse of discretion standard." ***State v. Stenson***, 132 Wn.2d 668, 718, 940 P.2d 1239 (1997). To prove that a prosecutor's actions constitute error, the defendant must show that the prosecutor did not act in good faith and the prosecutor's actions were improper. ***State v. Manthie***, 39 Wn. App. 815, 820, 696 P.2d 33 (1985) (*citing* ***State v. Weekly***, 41 Wn.2d 727, 252 P.2d 246 (1952)). The

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[1] "'Prosecutorial misconduct' is a term of art, but is really a misnomer when applied to mistakes made by the prosecutor during trial." ***State v. Fisher***, 165 Wn.2d 727, 740 n. 1, 202 P.3d 937 (2009). Recognizing that words pregnant with meaning carry repercussions beyond the pale of the case at hand and can undermine the public's confidence in the criminal justice system, both the National District Attorneys Association (NDAA) and the American Bar Association's Criminal Justice Section (ABA) urge courts to limit the use of the phrase "Prosecutorial misconduct" for intentional acts, rather than mere trial error. *See* American Bar Association Resolution 100B (Adopted Aug. 9-10, 2010), http://www.americanbar.org/content/dam/aba/migrated/leadership/2010/annual/pdfs/100b.authcheckdam.pdf (last visited March 14, 2016); National District Attorneys Association, Resolution Urging Courts to Use "Error" Instead of "Prosecutorial Misconduct" (Approved April 10, 2010), http://www.ndaa.org/pdf/prosecutorial_misconduct_final.pdf (last visited March 14, 2016). A number of appellate courts agree that the term "prosecutorial misconduct" is an unfair phrase that should be retired. *See, e.g.*, ***State v. Fauci***, 282 Conn. 23, 917 A.2d 978, 982 n. 2 (2007); ***State v. Leutschaft***, 759 N.W.2d 414, 418 (Minn. App. 2009), *review denied*, 2009 Minn. LEXIS 196 (Minn., Mar. 17, 2009); ***Commonwealth v. Tedford***, 598 Pa. 639, 960 A.2d 1, 28-29 (Pa. 2008). *See also* ***Kansas v. Sherman***, 305 Kan. 88, 378 P.3d 1060 (2016) (whenever a claim is asserted that any act of a prosecutor has denied a criminal defendant his or her due process rights to a fair trial, the Kansas Supreme Court will refer to the claim and judicial inquiry as a claim of "prosecutorial error"). In responding to appellant's arguments, the State will use the phrase "prosecutorial error." The State urges this Court to use the same phrase in its opinions.

defendant has the burden of establishing that the alleged error is both improper and prejudicial. ***Stenson***, 132 Wn.2d at 718. Even if the defendant proves that the conduct of the prosecutor was improper, the misconduct does not constitute prejudice unless the appellate court determines there is a substantial likelihood the error affected the jury's verdict. *Id.* at 718-19.

A defendant claiming prosecutorial error bears the burden of demonstrating that the remarks or conduct was improper and that it prejudiced the defense. ***State v. Gentry***, 125 Wn.2d 570, 640, 888 P.2d 570 (1995), *citing* ***State v. Hoffman***, 116 Wn.2d 51, 93, 804 P.2d 577 (1991). If a curative instruction could have cured the error and the defense failed to request one, then reversal is not required. ***State v. Binkin***, 79 Wn. App. 284, 293-294, 902 P.2d 673 (1995), *overruled on other grounds by* ***State v. Kilgore***, 147 Wn.2d 288, 53 P.3d 974 (2002). Failure by the defendant to object to an improper remark constitutes a waiver of that error unless the remark is deemed so "flagrant and ill-intentioned that it evinces an enduring and resulting prejudice that could not have been neutralized by an admonition to the jury." ***Stenson***, 132 Wn.2d at 719, *citing* ***Gentry***, 125 Wn.2d at 593-594.

When reviewing an argument that has been challenged as improper, the court should review the context of the whole argument, the issues in the case, the evidence addressed in the argument and the instructions given to the jury. ***State v. Russell***, 125 Wn.2d 24, 85-6, 882

P.2d 747 (1994) *citing* ***State v. Graham***, 59 Wn. App. 418, 428, 798 P.2d 314 (1990). "Remarks of the prosecutor, even if they are improper, are not grounds for reversal if they were invited or provoked by defense counsel and are in reply to his or her acts and statements, unless the remarks are not a pertinent reply or are so prejudicial that a curative instruction would be ineffective." ***Russell***, 125 Wn.2d at 86, *citing* ***State v. Dennison***, 72 Wn.2d 842, 849, 435 P.2d 526 (1967). The prosecutor is entitled to make a fair response to the arguments of defense counsel. ***Russell***, 125 Wn.2d at 87.

"Without a proper timely objection at trial, a defendant cannot raise the issue of prosecutorial misconduct on appeal unless the misconduct was so flagrant and ill-intentioned that no curative jury instruction could have corrected the possible prejudice." ***State v. Curtiss***, 161 Wn. App. 673, 250 P.3d 496 (2011); ***State v. Larios-Lopez***, 156 Wn. App. 257, 260, 233 P.3d 899 (2010) (*citing* ***State v. Gregory***, 158 Wn.2d 759, 841, 147 P.3d 1201 (2006) (*quoting* ***State v. Stenson***, 132 Wn.2d 668, 719, 940 P.2d 1239 (1997), *cert. denied*, 523 U.S. 1008, 118 S. Ct. 1193, 140 L. Ed. 2d 323 (1998)). This is because the absence of an objection "strongly suggests to a court that the argument or event in question did not appear critically prejudicial to an appellant in the context of the trial." ***State v. Swan***, 114 Wn.2d 613, 661, 790 P.2d 610 (1990).

A reviewing court must first evaluate whether the prosecutor's comments were improper. ***State v. Anderson***, 153 Wn. App. 417, 427,

220 P.3d 1273 (2009). "The State is generally afforded wide latitude in making arguments to the jury and prosecutors are allowed to draw reasonable inferences from the evidence." ***Anderson***, 153 Wn. App. at 427-28, 220 P.3d 1273. It is not error for a prosecutor to argue that the evidence does not support a defense theory, ***State v. Russell***, 125 Wn.2d 24, 87, 882 P.2d 747 (1994) (*citing* ***State v. Graham***, 59 Wn. App. 418, 429, 798 P.2d 314 (1990), ***State v. Contreras***, 57 Wn. App. 471, 476, 788 P.2d 1114, *review denied*, 115 Wn.2d 1014, 797 P.2d 514 (1990)), and "the prosecutor, as an advocate, is entitled to make a fair response to the arguments of defense counsel." ***Russell***, 125 Wn.2d at 87. Moreover, "[r]emarks of the prosecutor, even if they are improper, are not grounds for reversal if they were invited or provoked by defense counsel and are in reply to his or her acts and statements, unless the remarks are not a pertinent reply or are so prejudicial that a curative instruction would be ineffective." *Id.* at 86.

"A prosecutor's improper comments are prejudicial 'only where 'there is a substantial likelihood the misconduct affected the jury's verdict.'" ***State v. Yates***, 161 Wn.2d 714, 774, 168 P.3d 359 (2007) (*quoting* ***State v. Brown***, 132 Wn.2d 529, 561, 940 P.2d 546 (1997)); ***Fisher***, 165 Wn.2d at 747. "A reviewing court does not assess '[t]he prejudicial effect of a prosecutor's improper comments... by looking at the comments in isolation but by placing the remarks 'in the context of the total argument, the issues in the case, the evidence addressed in the

argument, and the instructions given to the jury.'"" *Id.* (*quoting* ***Brown***, 132 Wn.2d at 561; ***State v. Johnson***, 158 Wn. App. 677, 683, 243 P.3d 936 (2010). "[R]emarks must be read in context." ***State v. Pastrana***, 94 Wn. App. 463, 479, 972 P.2d 557 (1999), *abrogated in part on other grounds by* ***State v. Gamble***, 154 Wn.2d 457, 114 P.3d 646 (2005); ***State v. Larios-Lopez***, 156 Wn. App. 257, 261, 233 P.3d 899 (2010).

In closing argument, a prosecutor is permitted to argue the facts in evidence and reasonable inferences therefrom. ***State v. Dhaliwal***, 150 Wn.2d 559, 577, 79 P.3d 432 (2003); ***State v. Smith***, 104 Wn.2d 497, 510, 707 P.2d 1306 (1985). The prosecutor does not shift the burden of proof when it points out the evidentiary deficiencies of defendant's arguments. *See* ***Russell***, 125 Wn.2d at 85-86.

In this case, the State made the following argument in closing:

> But what did we hear? We heard that Ms.—Ms. Lozada and the defendant had begun dating in 2014, that the relationship ended in February of 2015, so that by August when this crime was committed, they had had a dating relationship. And you heard how, even in July of 2015, that was part of the reason that they had that confrontation, that Ms. Lozada said the defendant wanted to maintain that relationship and she didn't. He didn't seem to understand that. So it's very clear that they did have a relationship, a relationship that was at least important enough to the defendant to be worth fighting over and taking a key fob over.

IIIRP 226.

At no point in its closing argument did defense counsel object, and at no point did the State argue about prior acts of domestic violence.

In the defense closing argument, however, defense counsel discussed the prior incident where the victim testified that she was kidnapped by the defendant. IIIRP 230-231. It was only during rebuttal argument that the State discussed the testimony from the victim that the defendant had assaulted her in the past and broke her ribs. IIIRP 235. Again, the argument was not objected to by the defense.

There is nothing improper about the State's arguments. At no point did the state argue propensity evidence. The initial closing argument did not reference any prior acts of domestic violence, but only in rebuttal after it was discussed by the defense, did the State discuss it. Even if improper, a prosecutor's remarks that are in direct response to an argument made by the defense is not grounds for reversal so long as the argument does not extend beyond what would be necessary to respond to the defense argument, does not introduce matters not before the jury, and is not so prejudicial that a curative instruction would not suffice. ***State v. Dixon***, 150 Wn. App. 46, 465, 207 P.3d 459 (2009), *citing* ***State v. Francisco***, 148 Wn. App. 168, 178-79, 199 P.3d 478 (2009) (*quoting* ***State v. Dykstra***, 127 Wn. App. 1, 8, 110 P.3d 758 (2005)). In this case, the State's arguments fall squarely within proper arguments in response to

the defense argument, and clearly argue facts that were introduced at trial. *See* IIRP 112-113.

Because the comments were not objected to, the defendant bears the burden of the heightened standard of establishing that the comments were flagrant or ill-intentioned. This he cannot do. Not only were the comments based on evidence properly introduced, they were in direct response to the defense closing. The defendant's argument is without merit.

3. THE TRIAL COURT PROPERLY FOUND THAT THERE WAS SUFFICIENT EVIDENCE PRESENTED TO ESTABLISH THAT THIS INCIDENT WAS DOMESTIC VIOLENCE RELATED FOR PURPOSES OF RCW 10.99.020(5) WHEN THE VICTIM AND DEFENDANT HAD A PRIOR DATEING RELATIONSHIP, THE DEFENDANT TOOK THE CAR'S SECURITY ALARM KEYFOB EARLIER, AND HE KNEW THAT THE CAR BELONGED TO THE VICTIM.[2]

Revised Code of Washington 9.94A.525(21) states:

(21) If the present conviction is for a felony domestic violence offense where domestic violence as defined in

[2] The appellant's opening brief provides no argument as to this issue, other than stating it in the "issues presented" section. Brief of Appellant, page 2. Arguments unsupported by applicable authority and meaningful analysis should not be considered. ***Cowiche Canyon Conservancy v. Bosley***, 118 Wn.2d 801, 809, 828 P.2d 549 (1992); ***State v. Elliott***, 114 Wn.2d 6, 15, 785 P.2d 440 (1990); ***Saunders v. Lloyd's of London***, 113 Wn.2d 330, 345, 779 P.2d 249 (1989); ***In re Disciplinary Proceeding against Whitney***, 155 Wn.2d 451, 467, 120 P.3d 550 (2005)(*citing* ***Matter of Estate of Lint***, 135 Wn.2d 518, 532, 957 P.2d 755 (1998)(declining to scour the record to construct arguments for a litigant); RAP 10.3(a). The State is addressing the merits of the claim, but does not waive its assertion that this matter was not properly analyzed by the appellant.

> RCW 9.94A.030 was plead [pleaded] and proven, count priors as in subsections (7) through (20) of this section; however, count points as follows: . . .

RCW 9.94A.030 incorporates the definition of "domestic violence" as defined in RCW 10.99.020 and RCW 26.50.010. The applicable statute here, RCW 10.99.020(5), defines domestic violence as follows:

> (5) "Domestic violence" includes but ***is not limited to*** any of the following crimes when committed by one family or household member against another:
> (a) Assault in the first degree (RCW 9A.36.011);
> (b) Assault in the second degree (RCW 9A.36.021);
> (c) Assault in the third degree (RCW 9A.36.031);
> (d) Assault in the fourth degree (RCW 9A.36.041);
> (e) Drive-by shooting (RCW 9A.36.045);
> (f) Reckless endangerment (RCW 9A.36.050);
> (g) Coercion (RCW 9A.36.070);
> (h) Burglary in the first degree (RCW 9A.52.020);
> (i) Burglary in the second degree (RCW 9A.52.030);
> (j) Criminal trespass in the first degree (RCW 9A.52.070);
> (k) Criminal trespass in the second degree (RCW 9A.52.080);
> (l) Malicious mischief in the first degree (RCW 9A.48.070);
> (m) Malicious mischief in the second degree (RCW 9A.48.080);
> (n) Malicious mischief in the third degree (RCW 9A.48.090);
> (o) Kidnapping in the first degree (RCW 9A.40.020);
> (p) Kidnapping in the second degree (RCW 9A.40.030);
> (q) Unlawful imprisonment (RCW 9A.40.040);
> (r) Violation of the provisions of a restraining order, no-contact order, or protection order restraining or enjoining the person or restraining the person from going onto the grounds of or entering a residence, workplace, school, or day care, or prohibiting the person from knowingly coming

> within, or knowingly remaining within, a specified distance of a location (RCW 10.99.040, 10.99.050, 26.09.300, 26.10.220, 26.26.138, 26.44.063, 26.44.150, 26.50.060, 26.50.070, 26.50.130, 26.52.070, or 74.34.145);
> (s) Rape in the first degree (RCW 9A.44.040);
> (t) Rape in the second degree (RCW 9A.44.050);
> (u) Residential burglary (RCW 9A.52.025);
> (v) Stalking (RCW 9A.46.110); and
> (w) Interference with the reporting of domestic violence (RCW 9A.36.150).

(emphasis added).

A "family or household member" is defined, in part, as people who are 16 years of age or older who had a dating relationship. RCW 10.99.020(3). A "dating relationship" is defined as a social relationship that is romantic in nature. RCW 10.99.020(4); 26.50.010(2).

In this case, Lozada testified that she and the defendant had a dating relationship for approximately six months. RP 44-45. She indicated that both she and the defendant were over the age of 16 at the time. *Id.* RCW 10.99.020(5) contains a non-exclusive list of crimes that may involve "domestic violence." In this case, evidence was presented that the defendant had taken the victim's security remote to the vehicle—a security system that he had previously installed on the car without her consent. IIRP 49, 55. The victim described a situation in which the defendant was harassing her after their relationship had ended. IIRP 53. The victim described the defendant grabbing her and taking her car keys from her. *Id.*

This case is not a situation in which the defendant committed a random crime only later to discover that the victim had been someone he had once dated. Rather, this was part of a volatile relationship where the defendant specifically targeted this specific car with this specific owner. In such circumstances, it clearly falls within the definition of domestic violence as authorized in RCW 10.99.020.

4. THIS COURT SHOULD REMAND FOR CORRECTION OF THE JUDGMENT AND SENTENCE REGARDING PROPERTY FORFEITURE CONTAINED IN APPENDIX F, SECTION VII.

The defendant asserts that, under ***State v. Roberts***, 185 Wn. App. 94, 339 P.3d 995 (2014), the trial court lacked the statutory authority to forfeit all seized property. Brief of Appellant, page 19. The State agrees that under ***Roberts***, 185 Wn. App. 94, 330 P.3d 995 (2014), the sentencing court cannot forfeit all seized property as a condition of sentence. The State further agrees that remanding this case for correction of the judgment and sentence is appropriate.

The State would propose simply deleting the language "forfeit items in property" from section VII of Appendix F of the judgment and sentence. The judgment and sentence itself contains the legally correct language that property may be returned to the rightful owner if such a request is made within 90 days. See CP 57-72, paragraph 4.4.

5. THIS COURT SHOULD DECLINE TO REVIEW THE TRIAL COURT'S IMPOSITION OF THE LEGAL FINANCIAL OBLIGATIONS BECAUSE DEFENDANT FAILED TO OBJECT AND PRESERVE THE ISSUE BELOW.

a. The issue was not preserved below.

Defendant argues the trial court impermissibly levied legal financial obligations (LFOs) on him without doing an adequate inquiry regarding whether he had the present and future ability to pay those costs. Brief of Appellant at page 22. Defendant did not challenge the imposition of any of his legal financial obligations at the time of his sentencing. IVRP 258-259. Defendant's failure to object should preclude this Court from reviewing the issue on appeal, as defendant waived his right to raise any issue regarding his legal financial obligations.

Generally, the appellate court will not consider a matter raised for the first time on appeal. ***State v. Kirkman***, 159 Wn.2d 918, 926, 155 P.3d 125 (2007). An exception exists for claims of error that constitute manifest constitutional error. RAP 2.5(a)(3). If a cursory review of the alleged error suggests a constitutional issue, then defendant bears the burden to show the error was manifest. ***State v. Lynn***, 67 Wn. App. 339, 345, 835 P.2d 251 (1992). Error is "manifest" if defendant shows that he was actually prejudiced by it. If the court reaches the merits of the claimed error it may still be harmless. ***Kirkman***, 159 Wn.2d at 927.

In ***Blazina***, the Washington State Supreme Court determined the Legislature intended that prior to the trial court imposing discretionary legal financial obligations, there must be an individualized determination of a defendant's ability to pay. ***State v. Blazina***, 182 Wn.2d 827, 834, 344 P.3d 680 (2015). The Supreme Court based its reasoning on its reading of RCW 10.01.160(3), which states,

> The court shall not order a defendant to pay costs unless the defendant is or will be able to pay them. In determining the amount and method of payment of costs, the court shall take account of the financial resources of the defendant and the nature of the burden that payment of costs will impose.

Blazina, 182 Wn.2d at 837-38. *See* RCW 10.01.160(3).

Therefore, to comply with ***Blazina***, a trial court must engage in an inquiry with a defendant regarding his or her individual financial circumstances and make an individualized determination about not only the present but also the future ability of that defendant to pay the requested discretionary legal financial obligations before the trial court imposes them. ***Blazina***, 182 Wn.2d at 837-38.

In this case, the trial court did conduct a ***Blazina*** hearing and waived all non-mandatory legal financial obligations, as argued below. *See* CP 57-72. Here, there was no objection to the imposition of the mandatory costs and fees.

This Court should exercise its discretion to not entertain defendant's unpreserved argument that the trial court did not make a proper inquiry regarding his ability to pay his legal financial obligations and should affirm the trial court's imposition of the legal financial obligations.

b. The filing fee, DNA fee and crime victim penalty fees are all mandatory.

The State maintains, as argued above, that defendant has not preserved any issue in regards to legal financial obligations, as there was no objection to any of the legal financial obligations when the trial court imposed them. Additionally, contrary to defendant's assertion, the criminal filing fee, DNA fee, and crime victim penalty assessment are all mandatory. This Court should continue to adhere to its holding in ***State v. Lundy***, 176 Wn. App. 96, 308 P.3d 755 (2013), as defendant has not shown that ***Lundy*** is inapplicable to this case. In ***Lundy***, this court held:

> As a preliminary matter, we note that Lundy does not distinguish between mandatory and discretionary legal financial obligations. This is an important distinction because for mandatory legal financial obligations, the legislature has divested courts of the discretion to consider a defendant's ability to pay when imposing these obligations. For victim restitution, victim assessments, DNA fees, and criminal filing fees, the legislature has directed expressly that a defendant's ability to pay should not be taken into account. *See, e.g., State v. Kuster*, No. 30548–1–III, 2013 WL 3498241 (Wash.Ct.App., July 11,

> 2013). And our courts have held that these mandatory obligations are constitutional so long as "there are sufficient safeguards in the current sentencing scheme to prevent imprisonment of indigent defendants." *State v. Curry*, 118 Wash.2d 911, 918, 829 P.2d 166 (1992) (emphasis added).
>
> RCW 9.94A.753(4) and (5) dictate that "[r]estitution shall be ordered whenever the offender is convicted of an offense which results in ... damage to or loss of property" and "[t]he court may not reduce the total amount of restitution ordered because the offender may lack the ability to pay the total amount." Thus, the $554.52 in restitution Lundy owed is mandatory. Additionally, a $500 victim assessment is required by RCW 7.68.035(1)(a), a $100 DNA collection fee is required by RCW 43.43.7541, and a $200 criminal filing fee is required by RCW 36.18.020(2)(h), irrespective of the defendant's ability to pay. *See State v. Curry*, 62 Wash.App. 676, 680–81, 814 P.2d 1252 (1991), *aff'd*, 118 Wash.2d 911, 829 P.2d 166; *State v. Thompson*, 153 Wash.App. 325, 336, 223 P.3d 1165 (2009). Because the legislature has mandated imposition of these legal financial obligations, the trial court's "finding" of a defendant's current or likely future ability to pay them is surplusage.

Id. at 102.

In this case, the only costs that were imposed—the filing fee, the DNA fee, and the crime victim penalty assessment—were mandatory costs. *See* CP 57-72. Under the holding of ***Lundy***, this court should find the defendant's claim without merit.

6. THE STATE WILL NOT BE SEEKING APPELLATE COSTS IN THIS MATTER.

The defendant alleges that the imposition of appellate costs in this matter would be unconstitutional. Brief of Appellant, page 26. The defendant's argument fails to take into account RAP 14.2. Nevertheless, this court should not consider the constitutionality claim and reject the defendant's argument as moot because the State is not seeking appellate costs.

D. CONCLUSION.

For the above stated reasons, the State respectfully requests that this court affirm the defendant's conviction below and remand only for deletion of the property forfeiture language.

DATED: APRIL 19, 2017.

MARK LINDQUIST
Pierce County
Prosecuting Attorney

MICHELLE HYER
Deputy Prosecuting Attorney
WSB # 32724

Certificate of Service:
The undersigned certifies that on this day she delivered by ~~U.S. mail~~ or ABC-LMI delivery to the attorney of record for the appellant and appellant c/o his attorney true and correct copies of the document to which this certificate is attached. This statement is certified to be true and correct under penalty of perjury of the laws of the State of Washington. Signed at Tacoma, Washington, on the date below.

4/19/11 _____
Date Signature

PIERCE COUNTY PROSECUTOR
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